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No. 84-1791

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CORPUS CHRISTI PEOPLE'S BAPTIST CHURCH, INC. *et al.*,
Appellants,

v.

STATE OF TEXAS,
Appellee.

On Appeal From the Supreme Court of Texas

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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The Motion to Dismiss or Affirm seeks to persuade the Court to proceed *summarily* to give its sanction to the discontinuance of a successful lifeline to children in severe crisis. This is on the presumed ground that the State knows solely how such children may be protected and regenerated, though this record belies such presumption. Hence no non-conforming methodology may be tolerated in Texas, even one dictated by salutary religious principle in a non-tax-dependent ~~faee~~ faith community, which indeed recognizes a legitimate State interest in child protection, and whose work the Texas Supreme Court praises.

As will be seen (pages 2-3 *infra*), the core problem at this stage of the litigation is the State's masking of the record. The record obliterates the State's pretension that the regulatory scheme is other than highly intrusive, arbitrary and value-laden. It is the plea of the appellants that the Court, at the very least, explore the record and then the legal issues (which can be comprehended only in the light of that record).

The Church's homes at this time continue to save lives and represent a last resort for parents desperate to prevent the loss of children, many of whom have been failed by the imposed uniform methodology of State-run or State-licensed programs. All three courts below, (including the Texas Supreme Court) have, by their orders, recognized the irreparable harm that would result were the homes shut down. The Church and parents have no lobby whereby a statute could be inacted with rational exemptive provisions, nor the funds needed, in this era of costly pressure group lobbying, to achieve such major legislation.

The State, in its Motion to Dismiss or Affirm, relies solely upon the proposition that prior decisions of this Court have "explicitly foreclosed" the questions presented by appellants. (Motion to Dismiss or Affirm (hereinafter "Motion"), 3). From Pages 3 to 8 the Motion cites decisions of this Court which the State considers to be controlling precedent. The Jurisdictional Statement discussed these cases and showed that none of them can have the preclusive effect claimed for them by the State, but that several of them, against the background of the trial record herein, indeed point to the need for plenary consideration of this case by the Court. For additional reasons the Motion should be denied:

1. Ignoring of the Trial Record. The State's Motion perpetuates the Texas Supreme Court's ignoring of the detailed record made upon trial. Hence, viewed solely through the lens of the State's Motion, no substantial

federal question is visible. But ". . . it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality." *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287, 293 (1941) (per Frankfurter, J.). As clearly appears from a reading of the Jurisdictional Statement and the Appendix thereto, the State's position in its Motion is one of screening off the realities at the heart of this case which witness after witness (including State officials) established in the trial court. As this Court stated in *Whitus v. Georgia,* 385 U.S. 545, 550 (1967):

> "There is no question as to the constitutional principle — the question involved is its application to the facts disclosed in the record. It is our province to 'analyze the facts in order that the appropriate enforcement of the federal right may be assured,' Norris v. Alabama, 294 U.S. 587, 590 . . ., and while the conclusions reached by the highest court of the state 'are entitled to great respect . . . it becomes our solemn duty to make independent inquiry and determination of the disputed facts . . .' "

Such a duty is clearly presented here since the trial record contradicts the critically important conclusions reached by the court below regarding the specific claims made by appellants respecting religious exercise, real injury thereto, compelling societal interest, and less restrictive means. The call for this Court's independent inquiry is made even more demanding by the failure of the court below even to have acknowledged the important claims made by the intervening parents, children and staff.

2. *Ignoring of Issues Raised by Parties.* Unaccountably, the Motion states:

> "Appellants essentially bring two questions to the Court: whether state licensing of child-care facilities operated by a religious institution violates either the Free Exercise or Establishment Clause of the First Amendment."

Motion, 3. But the Jurisdictional Statement brings four other questions to the Court. These, of their nature, do not admit of being telescoped into the two issues to which the State desires to confine this appeal. Those familiar with the Church's homes and methodology, as clearly disclosed in detail upon the record, know how insistent is the demand of the parents whose children are placed there that those homes and that methodology continue to sustain and regenerate their children, however distinct that methodology may be from the methodology of the State. It is scarcely credible that the State, instead of being willing to present argument against the substantiality of the questions presented on parental choice, rights of the children, and vocational liberties of staff members, would simply inform this Court that these are non-issues.

3. *Misconception of Effect of Summary Affirmance.* The State's Motion treats as binding precedents certain summary affirmances by this Court in prior cases, *e.g., Kansas ex rel. O'Sullivan v. Heart Ministries, Inc.*, 607 P.2d 1102 (Kan. 1980), *appeal dismissed*, 449 U.S. 802 (1980). This Court has, however, often stressed:

> "When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached."[1]

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1. And see *Anderson v. Celebrezze*, 460 U.S. 780, 784 fn. 5 (1983) wherein the Court characterized its summary affirmances in

Fusari v. Steinberg, 419 U.S. 379, 391-392 (1975) (Burger, C.J., concurring); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 949 (1982). As has been shown in the Jurisdictional Statement, the summary affirmances cited by the State in support of its contention that they "leave no room for real controversy" (Motion, 3) on this appeal were made in cases clearly distinguishable from the present case.

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certain previous cases as "a rather slender reed" for purposes of precedent. The Court continued:

> "We have often recognized that the precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.' A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment."

CONCLUSION

For all of the reasons stated herein and in the Jurisdictional Statement, the Motion to Dismiss or Affirm should be denied.

Respectfully submitted,

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